A

JOHNSON SIPULOU & ORS

v.

THE STATE GOVERNMENT OF SABAH & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[SUIT NO: K22-181-2002]
6 JULY 2009

C ***LAND LAW:*** *Customary land - Claim of - Whether natives occupying land gazetted as native reserve enjoyed customary tenure over such land*

NATIVE LAW AND CUSTOM: *Land dispute - Customary tenure - Land gazetted as native reserve - Whether natives occupying such land enjoyed customary tenure over such land - Whether State Government's* D *gazette revocation of parts of nature reserve unlawful*

On 1 August 1955, by Government Gazette 341/55, some 749 acres of land occupied by members of the 6th plaintiff – a cattle stock co-operative society – was declared the Kampung Kayu Madang Native Reserve ('the Reserve') for use by such members to graze E their buffaloes. PW5's father – a founding member and former chairman of the 6th plaintiff – surrendered three pieces of his land within the grazing area to the Government without compensation, in order for the whole 749 acres of land to be declared a native reserve. However in November 1996, the first defendant revoked 115 F acres in the Reserve by Gazette Notification 669/1996. In January 2003 the first defendant further revoked an additional 80 acres. The 6th plaintiff brought the instant representative action for various declarations and reliefs arguing that the first defendant's revocations had literally driven its members out of the Reserve and halted their G cattle grazing activity.

Held (allowing the 6th plaintiff's claim):

(1) The facts relating to the origin of the 6th plaintiff were not challenged at all in cross examination. They were therefore H deemed to be admitted and established. *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Case* (foll). (para 12)

(2) Having regard to the evidence and the probabilities of the case, I the land stated in the Schedule to Gazette 341/55 referred to the grazing land occupied by members of the 6th plaintiff for

the purpose of grazing buffaloes. The High Court would accept the plaintiffs' evidence and plaintiffs' counsel's submission on the point. (para 16)

(3) The 'Kampong Kayu Madang Native Reserve' was not a 'kampong reserve' because if it was, a communal title would have been issued under s. 76 of the Land Ordinance (Sabah Cap 68). The 'native members' of the 6th plaintiff would come within the definition of "any community thereof" under s. 78(1) of the Land Ordinance (Sabah Cap 68). (para 18)

(4) The surrender of the three pieces of land to the Government by the chairman of the 6th plaintiff constituted a valid consideration thereby bringing into existence a valid contract between the 1st defendant and the 6th plaintiff that the 1st defendant by implication agreed to protect the present and future interest and well being of the members of the 6th plaintiff by declaring their grazing land as a Native Reserve for their exclusive use as grazing land. (para 26)

(5) At the time of the publication of Gazette 341/55, it was reasonable to conclude that the members of the 6th plaintiff had indeed customary tenure over the Reserve. The native members of the 6th plaintiff were "persons having native customary tenure" as defined in the Sabah Land Ordinance and should be accorded the same status as those in possession of a title deed. *Naung Felix Sitom v. PP* (refd). (paras 28-30)

(6) It was wrong for the 1st defendant to ignore the proprietary rights and interest of the 6th plaintiff which the Land Ordinance sought to protect by publishing Gazette No. 669/96 and degazetting Gazette No. 341/55 thereby depriving the 6th plaintiff 115 acres of the Reserve. Gazette No. 341/55 was obviously still valid. It was not within the 1st defendant's right to disregard the 6th plaintiff's rights and interest in degazetting any part of Gazette No. 341/55. (para 36)

(7) The defendant's belated objection on limitation had to be overruled. *Tengku Ismail Tengku Sulaiman & Ors v. Sia Cheng Soon & Anor* (foll). (paras 39 & 40)

(8) In the instant case, the true beneficiaries of the Reserve were the members of the 6th plaintiff. The 6th plaintiff was thus the right party to bring the action since the reliefs sought were strictly for the benefit of the 6th plaintiff's members. *Vellasamy*

Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors (foll); *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* (refd); *The Duke of Bedford v. Ellis* (refd). (paras 41-44)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Case [1995] 3 CLJ 639 CA ***(foll)***

Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 HC ***(refd)***

Kerajaan Negeri Selangor v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Naung Felix Sitom v. PP [1999] 6 CLJ 583 HC ***(refd)***

Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Tengku Ismail Tengku Sulaiman & Ors v. Sia Cheng Soon & Anor [2006] 3 CLJ 556 CA ***(foll)***

The Duke of Bedford v. Ellis [1901] AC 1 ***(refd)***

Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2006] 1 CLJ 805 HC ***(foll)***

Legislation referred to:

Land Ordinance (Cap 68) Sabah, s. 76

Land Ordinance 1930, s. 78(1)

For the plaintiffs - Ronny Cham; M/s Ronny Cham & Co

For the defendants - Julita Gumpil; State AG's Chambers

Reported by Andrew Christopher Simon

JUDGMENT

Abdul Rahman Sebli JC:

[1] The plaintiffs' claim, *inter alia* is for the following reliefs:

(1) A declaration that the title to the Kampong Kayu Madang Native Reserve be held by the natives under their native customary rights.

(2) A declaration that the 1st defendant's revocation of the reservation of the 115 acres of land in the Reserve and the vesting of that portion of land in the 2nd defendant are unlawful, null and void.

(3) The defendant do issue a title for the whole of the land in the Reserve to the 6th plaintiff or to such other person who represents the natives in Penampang and Telipok in a form permitted by the Land Ordinance (Sabah Cap 68).

(4) The defendant and its officers do revoke the gazette notification for the Reserve immediately before or upon the issue of the title to the land in the reserve.

[2] At the outset of his submissions learned counsel for the plaintiffs conceded that the proper plaintiff in this action is the 6th plaintiff, the Penampang Grazing Cooperative Society Limited as the 1st, 2nd, 4th and 5th plaintiffs were and are the ex officials of the 6th plaintiff. Therefore for purposes of this judgment I shall only consider the 6th plaintiff's case against the defendants.

[3] Briefly the undisputed facts are as follows. The subject matter in dispute, namely the Kampung Kayu Madang Native Reserve (the Reserve), was gazetted in the North Borneo Government Gazette No. 341/55 on 1 August 1955, almost 60 years ago. The Reserve comprises 749 acres of land under Survey Lot No. 2842 and is situated in the Menggatal/Telipok area in the State of Sabah.

[4] In November 1996, by Gazette Notification No. 669/1996 the 1st defendant revoked 115 acres of the land in the Reserve and vested it in the Kota Kinabalu Municipal Council for use as a rubbish dumping site. An additional 80 acres was revoked in January 2003 under Gazette Notification No. 69/2003, after the commencement of the present suit. The land was intended for Institute Awam Malaysia Sabah.

[5] The 6th plaintiff's grievance is that the revocations had literally driven its members out of the Reserve and halted their grazing activity in the Reserve.

[6] The primary evidence relating to the 6th plaintiff's claim has been accurately set out by learned counsel for the plaintiffs in his written submissions dated 9 February 2009 and I can do no better than to reproduce them. They are as follows. PW1 Johnson bin Sepulou, a 75 year old man testified that he was the "Cattle Stock Inspector" of the Penampang Stock Owner's Association. He referred to the survey plan (AABD1) and testified that he helped the surveyor, one Awang Omar Yassin in carrying out the survey of the grazing reserve measuring 749 acres (the grazing land).

[7] PW1 testified that at the time of the survey, there were already 400 heads of buffaloes belonging to the members of the Penampang Stock Owners Association. This fact is corroborated by the report of the Co-operative Assistant dated 17 December 1958 (AABD25,26). In para. 7 of his witness statement (PWS1) he further testified that the then Resident (when Sabah was still a

British colony) of Jesselton (the former name of Kota Kinabalu) had advised the Penampang Stock Owners Association to be reconstituted as a cooperative society because:

> kawasan tanah itu luas dan bilangan ternakan pun semakin bertambah. Para ahli-ahli pun bertambah juga. Oleh sebab itu, kami dinasihatkan oleh Residen Jesselton tersebut untuk menukar penubuhan kami sebagai sebuah korporasi atas sebab korporasi adalah pertubuhan yang lebih sesuai untuk menjaga kawasan itu dan berfaedah kepada para ahli-ahli.

[8] According to PW1, in 1960 the Penampang Stock Owner's Association was reconstituted as "Penampang Co-operative Grazing Society Ltd", which name was later changed to "Penampang Grazing Cooperative Society Ltd", the current name of the 6th plaintiff. He testified that upon the reconstitution of the Penampang Stock Owner's Association as the 6th plaintiff he was appointed as one of the four trustees for the 6th plaintiff and was still the "Cattle Stock Inspector" of the 6th plaintiff.

[9] PW1's evidence on this point is corroborated by PW3 Cornelius Kinson Mositoh, 85 years old who testified that he was the pioneer secretary of the Penampang Stock Owner's Association since the mid 40's. He testified that the members of the Penampang Stock Owner's Association occupied the grazing land from the beginning for the grazing of buffaloes.

[10] He testified that sometime towards the end of the 50's, the members were increasing in number and so were the heads of buffaloes in the grazing land. The members of the Penampang Stock Owner's Association were invited to a meeting on 13 December 1958 by the then Co-operative Assistant. He produced the report dated 17 December 1958 by the then Co-operative Assistant as evidence (AABD25,26). The report concluded:

> I believe that the President had said and I think the Association will eventually become a Co-operative Grazing Land Society.
>
> I understand that many people wanted to join the Association but refused admission because of limited size of the grazing land. This is a problem and .. which the Branch may be asked to solve. I think this may be solved by (a) control grazing as being done successfully at the Sorob Cattle Farm and the introduction of good grass thus increase the capacity of .. acre (b) disposing the surplus stock of a member - this may be done through the Society.
>
> (see AABD26).

[11] PW3 further testified that shortly after the meeting, the Registrar of Co-operative Societies, Mr. Colin Clarkson wrote to him as secretary of the Penampang Stock Owner's Association suggesting that their Association should be reconstituted as a registered Co-operative Society. Mr. Colin Clarkson's letter is at AABD27,28,29.

[12] These facts relating to the origin of the 6th plaintiff were not challenged at all in cross examination. They are therefore deemed to be admitted and established: see *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal* [1995] 3 CLJ 639 where Gopal Sri Ram JCA (as he then was) said:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, without valid reasons, refrains from doing so, then he may be barred from raising it in argument.

[13] Also unchallenged is PW1's testimony that due to the increase of the members of the Penampang Stock Owner's Association and the heads of buffaloes, the then Resident of Jesselton had advised the Association to be reconstituted as a cooperative society because a cooperative society would be more suitable to "menjaga kawasan tanah itu dan berfaedah kepada para ahli-ahli."

[14] PW3's further evidence is that the grazing land has always been under the ownership of the 6th plaintiff. He said sometime in the early 50s about 16 of the members wanted to apply for land titles for the purpose of securing the grazing land for grazing buffaloes and the Land Commissioner, Mr. Ingle, ordered Awang Omar Yassin to survey the land which was 749 acres in size. He confirmed PW1's evidence that the then Resident of Jesselton thought that the land was too big to be issued with titles to individual members and so he suggested to the Association to declare the land as a Native Reserve for grazing for use by members of the Association. This too was unchallenged in cross examination.

[15] PW3 had also confirmed that the contents of the Gazette No. 341/55 represents the true facts, in particular the following:

> Whereas the land described in the Schedule is land occupied by natives as a grazing land;
>
> And Whereas it is considered undesirable to register titles for such land:

A Now, Therefore, in exercise of the powers conferred upon him by subsection (i) of section 78 of the Land Ordinance 1930, and all other powers thereunto him enabling, the Governor hereby declares such land to be a native reserve to be known as the Kampong Kayu Madang Native Reserve..

B **[16]** Having regard to the evidence and the probabilities of the case it is my finding that the land stated in the Schedule to Gazette no. 341/55 refers to the grazing land occupied by members of the 6th plaintiff for the purpose of grazing buffaloes. I accept the plaintiff's evidence and learned counsel's submission on this point.

C **[17]** PW3 has produced the letter of the Registrar of Co-operative, Mr. Colin Clarkson dated 20 October 1959 (AABD27,28,29) in which Mr. Clarkson stated:

2(iii) By laws 4-6. Note that although there is no mention of restricted
D membership new admissions are, in practice, controlled: the Committee must first provisionally approve admission: the General Meeting must subsequently confirm there is no appeal against Committee's refusal if it is based on the fact that the Society's grazing ground can take into no more animals; a subsequent member can be required to make an initial contribution in return
E for the Society facilities already provided by the efforts of earlier members. It is, however, in the Society's hands to decide and control the admission of new members.

2(iv) By-laws 7 and 30 ... It is better to keep the member's annual subscription at a standard rate whether he enters buffalo into the
F grounds or not, I think. Broadly the receipts from grazing fees should be adjusted to pay for the upkeep of the grounds and fencing etc.

(see AABD27 para 2(iii) and AABD28 para 2(iv)).

G **[18]** There is no doubt therefore that the 749 acres of land declared as "Kampong Kayu Madang Native Reserve" under Gazette No. 341/55 is at all material times the grazing land occupied by the 6th plaintiff. I agree with learned counsel for the 6th plaintiff that the "Kampong Kayu Madang Native Reserve" is not a "kampong
H reserve" because if it was a communal title would have been issued under s. 76 of the Land Ordinance (Sabah Cap 68). I am also in agreement with counsel that the "native members" of the 6th plaintiff come within the definition of "any community thereof" under s. 78(1) of the Land Ordinance.

I

[19] Gazette No. 341/55 refers to "natives of the Penampang District and the Telipok area" who used the reserve as grazing ground for their cattle. The natives referred to therein must in my view refer only to the members of the 6th plaintiff who were all natives using the grazing land as grazing ground for their cattle. It cannot refer generally to all natives in Penampang and Telipok who did not use and are not using the land as grazing ground for their cattle. This cannot be a correct construction having regard to the evidence adduced. In any event there is no evidence to support the defendants' assertion that "the natives of Penampang District and Telipok" means all the natives in the two areas.

[20] The defendant's only witness DW3 Dorin Thomas Stuel @ Doreen refused to answer what the 2nd defendant understood by "natives of Penampang and Telipok". The transcript of the evidence of DW3 under cross examination shows as follows:

> Q: The defendant story has been that the Kampong Kayu Madang Grazing Reserve belong to natives of Telipok and Penampang. When you took 115 acres out of that grazing reserve why did you not pay compensation to the natives of Penampang and Telipok altogether?
>
> A: I was only instructed to pay the squatters that was brought to my attention through the reports of four parties.
>
> Q: As far as you were concerned you have nothing else to say except to say you were instructed to pay the money?
>
> A: Yes.

[21] PW5 Mohd Harry Sikopit @ Harri Siganul's evidence is of crucial importance to resolve this issue. His testimony is that his late father, Michael Milip bin Mogudam was the leader of the pioneering elders from Penampang who travelled to Telipok to start the grazing of buffaloes and cattle. His late father was one of the founding members of the Penampang Stock Owner's Association and later became Chairman of the 6th plaintiff.

[22] PW5 testified that only members of the 6th plaintiff were allowed to carry on grazing activities in the said grazing land and members of the 6th plaintiff must be natives from Penampang and Telipok. Natives in Penampang and Telipok who were not members of the 6th plaintiff were not allowed to carry on grazing activities in the grazing land. His answers in cross examination are pertinent. This is what he said:

A (Paragraph 12 of PWS5 referred to witness) This paragraph means only those *bona fide* members can become the *bona fide* members of the co-operative. Natives of Penampang and Telipok being members are allowed to graze. If they are not members they are not allowed.

(Page 18 paragraph 2 of AABD shown to witness) I agree with what it
B says. But members have to look after the area. Not non members.

[23] This evidence clearly shows that ever since the time of PW5's late father the said grazing land is for natives of Penampang and Telipok who were and are members of the 6th plaintiff. It was and is not meant for non members.
C

[24] PW5's evidence that from the beginning the grazing land was occupied only by native members of the 6th plaintiff as grazing ground is not challenged as well in cross examination. He also testified that initially the Association applied to have individual
D titles issued to individual members but the then Resident did not think it desirable to do so. Instead he advised all the members to have a common use of the land by declaring the grazing land as a Native Reserve for grazing purposes under s. 78(1) of the Land Ordinance 1930.

E **[25]** To do so his late father was requested by the Resident to surrender three pieces of his family land within the grazing land area to the Government without compensation in order that the whole of the 749 acres of land can be declared as a Native Reserve (see AABD4-6).

F **[26]** In this regard I agree with learned counsel for the 6th defendant that the surrender of the three pieces of land to the Government by the Chairman of the 6th plaintiff constituted a valid consideration thereby bringing into existence a valid contract
G between the 1st defendant and the 6th plaintiff that the 1st defendant by implication agreed to protect the present and future interest and well being of the members of the 6th plaintiff by declaring their grazing land as a Native Reserve for their exclusive use as grazing land.

H **[27]** The opening sentence of Gazette No. 341/55 is relevant. It states:

> WHEREAS the land described in the Schedule is land occupied by natives as a grazing ground.
> (see AABD18)

I

[28] Having regard to the historical events leading to the publication of this Gazette Notification, it is reasonable to conclude, and I find that at the time of its publication the members of the 6th plaintiff have indeed had customary tenure over the "Kampong Kayu Madang Native Reserve". A

[29] As to the legal effect of having customary tenure over land the decision of the Tawau High Court in *Naung Felix Sitom v. Pendakwa Raya* [2000] 7 MLJ 605 is relevant. In that case Richard Malanjum J (as he then was) held: B

> An alienated land as defined in the Enactment (Sabah Forests Enactment 1968) is not limited to land having a title deed issued. Section 2 of the Enactment provides the answer. And that being the case a person having native customary tenure as defined in the Sabah Land Ordinance should be accorded the same status as one that is in possession of a title deed. In fact section 67(2) of the Sabah Land Ordinance only gives the Collector discretion to require a native holding land under native customary tenure to acquire a title deed. C D

[30] Although the case is a criminal case I am of the view that the court's pronouncement of law on native customary tenure is equally applicable to the facts of the present case. Thus the native members of the 6th plaintiff are "persons having native customary tenure" as defined in the Sabah Land Ordinance and should be accorded the same status as one that is in possession of a title deed. E

[31] It has been decided by our apex court that the Government's right or interest is subject to any native rights over such land: see *Superintendant of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 FC. See also the Court of Appeal decision in *Kerajaan Negeri Selangor v. Sagong Tasi & Ors* [2005] 4 CLJ 169 CA where it was held, *inter alia* that the fact that the radical title to land is vested in the State is not an *ipse dixit* answer to a claim of customary title. F G

[32] It is pertinent to note that other than the 6th plaintiff there is no evidence whatsoever to show that the other natives of Penampang and Telipok who are not members of the 6th plaintiff have ever claimed customary tenure over the "Kampong Kayu Madang Native Reserve". H

[33] Furthermore, the evidence shows that only the 6th plaintiff applied for title to the said "Kampong Madang Native Reserve". PW5's evidence in his Witness Statement (PWS5) is as follows: I

> Accordingly, in 1986 December 31, we completed an official application for land title to be issued to our said grazing land. The application form is exhibited as page 63 and 64 of AABD. We filed this application at the Central Land Office on 7.3.1987. the 6th plaintiff paid RM1,000.00 for the application and was issued the official receipt by the Central Land office, which official receipt is exhibited as page 65 of AABD.

[34] The plaintiff's letter dated 13 January 1987 (ABD6 & 7) had an endorsement in the handwriting of the then Chief Minister, Datuk Joseph Pairin Kitingan, effectively approving the application of the 6th plaintiff for issuance of title to the "Kampong Madang Native Reserve" in their name subject of course to availability of land. This is not disputed by the 1st defendant.

[35] This approval, coupled with the subsequent communications between the relevant departments of the 1st defendant gave the 6th plaintiff a legitimate expectation that the 1st defendant would grant them a title to the Reserve.

[36] It is wrong for the 1st defendant to ignore the proprietary rights and interest of the 6th plaintiff which the Land Ordinance seeks to protect by publishing Gazette No. 669/96 and degazetting Gazette No. 341/55 thereby depriving the 6th plaintiff 115 acres of the "Kampong Kayu Madang Native Reserve". Gazette No. 341/55 is obviously still valid. In the minutes of meeting held on 7 December 1995 (see ABD25-28) the following transpired:

> 2.1 Encik Lee Chun Khiong, the Penolong Pemungut Hasil Tanah, Kota Kinabalu reported in the meeting that he had written to the Veterinary Department and the Ketua Daerah of Penampang and K.K. on 06.11.1995 but received no response. He confirmed that the Native Grazing Reserve gazetted in 1955 was still valid after he called up the Attorney General Chamber during the meeting.

[37] Mr. Lee Chun Khiong mentioned in the above minutes was not called by the defendants to show that the degazetting of the 115 acres from the "Kampong Kayu Madang Native Reserve" was reasonable and in accordance with the provisions of the Land Ordinance.

[38] Although Mr. Lee Chun Khiong is on record having said that he had consulted the Attorney General's Chambers which confirmed that the Native Grazing Reserve gazetted in 1955 is still valid, the 1st defendant through the State Attorney General's Chambers now say that the defendants were entitled to degazette

part of it. In my view it is not within the 1st defendant's right to disregard the 6th plaintiff's rights and interest in degazetting any part of Gazette No. 341/55.

[39] As for the defendants' unpleaded contention that the 6th plaintiff's action was filed out of time I need only refer to the Court of Appeal decision in *Tengku Ismail Tengku Sulaiman & Ors v. Sia Cheng Soon & Anor* [2006] 3 CLJ 556 where it was held:

> A plea of limitation raised at submissions stage after the court has gone through the whole process of full trial clearly no longer serves its purpose as a procedural bar when the case can, if raised at an earlier date, be struck out based on a technical defence. By reason of the failure to plead the issue of limitation, the plaintiffs clearly had been lulled into a sense of security that the case would be met on the merits. If it was still open for a defendant to raise limitation at such late stage, there would clearly have been a wastage of judicial time. To permit the defendants to raise limitation would effectively be giving the defendants an opportunity to renew the fight on an entirely different defence.

[40] On the authority of *Tengku Ismail* therefore the defendants' belated objection on limitation must be overruled.

[41] The defendants have also raised the issue of *locus standi*. It was pointed out that the 6th plaintiff had not been appointed as "trustee" of the Reserve in Gazette No. 341/55. In this regard it is important to note that the 6th plaintiff's action is a representative action. In *Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2006] 1 CLJ 805 Abdull Hamid Embong JCA speaking for the court held that the exact identities of the persons whom the named plaintiffs were representing were not an impediment to commencing a representative action so long as they were in a class of persons with a common interest and a common grievance. The High Court case of *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 was cited with approval where Haidar J (as he then was) said:

> A plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent and the fact that there are two opposing factions within the Kayan community does not prevent this action from being a representative action.

[42] In *The Duke of Bedford v. Ellis* [1901] AC 1 Lord Macnaghten said:

A a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

[43] In this case clearly the land in the Reserve does not belong to the Trustee mentioned in Gazette No. 341/1955. The true beneficiaries of the Reserve are the members of the 6th plaintiff. The 6th plaintiff is therefore the right party to bring this action as the reliefs sought are strictly for the benefit of the members of the 6th plaintiff.

[44] Having regard to the totality of the evidence and the whole circumstances of the case I am satisfied that the 6th plaintiff has proved its claim against the defendants. In the circumstances the 6th plaintiff's claim is allowed in terms of the writ of summons dated 9 August 2002.